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No. 572

In The
Supreme Court Of The United States

OCTOBER TERM, 1954

HENRY GRADY SNEAD,
Claimant
Petitioner (Appellant)

v.

UNITED STATES,
Respondent
(Appellee)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Henry Grady Snead, Claimant and Appellant, respectfully showeth:

(a). Petitioner seeks a review and reversal of this case which was decided by the United States Court of Appeals for the Fourth Circuit, on December 10, 1954, in Case No. 6874 under the style of *Henry Grady Snead, Claimant, Appellant* v. *United States of America, Appellee,* which opinion has not yet been published, but is attached hereto as an appendix. An opinion was given by the Trial Judge, under date of May, 1954, which opinion is found on page 53 of the appendix for appellant, certified as a part of the proceedings in the United States Court of Appeals for the Fourth Circuit.

BASIS OF JURISDICTION

(b). The grounds upon which the jurisdiction of this Court is sought to be invoked are as follows:

(i). The order of the United States Court of Appeals for the Fourth Circuit, entered December 10, 1954, is sought to be reviewed because of its conflict with other Circuit Courts of Appeal and the importance of having §3116 of the Internal Revenue Code construed.

(ii). No petition for re-hearing was filed in this matter, and by order entered by the United States Court of Appeals for the Fourth Circuit, the mandate of said Court was stayed, pending the application of the appellant of the Supreme Court of the United States for a writ of certiorari, providing the writ of certiorari is filed in said Supreme Court on or before February 1, 1955.

(iii). Jurisdiction is conferred upon the Supreme Court by Title 28 §1253 USCA.

QUESTIONS PRESENTED

1. Does Section 3116 of the Internal Revenue Code give the Government the right to confiscate and forfeit legitimate articles of commerce, from a licensed merchant, upon the theory that such legitimate articles of commerce may be used in manufacturing illicit whiskey?

2. Can the doctrine of "harmless error" be held to supply the complete lack of evidence on the part of the Gov ernment as to intent of the claimant?

3. Does the rule set forth in *Coffey, Claimant,* v. *United States,* 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684, apply in a case in which the United States starts a criminal proceeding for the identical offense, and then voluntarily dismisses such proceeding before a U. S. Commissioner?

(c). The Statute involved is 26 USCA 3116, reading as follows:

§3116. Forfeitures and seizures

"It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the Act of June 15, 1917, 40 Stat. 228 (U.S.C., Title 18, §§611-633)[1] for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent

to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws. 53 Stat. 362."

STATEMENT OF THE CASE

This proceeding was a forfeiture case instituted by a Libel filed in the Western District of Virginia, wherein a 1952 1-1/2 Ton Ford Truck, together with 140 bags of malt and 400 pounds of yeast were ordered forfeited to the United States under the provisions of 26 USCA 3116 under the following conditions: Henry Grady Snead, Petitioner, and Ira Jackson Seay, drove the truck in question from Henry County, Virginia, to Milwaukee, Wisconsin, where petitioner purchased 400 pounds of yeast and 140 bags of fine ground malt from Foedert Grain and Malt Company, giving the seller of the malt the name of Roy Scott, and the seller of the yeast the name of Turner Bakery; the license tags were switched during the return journey; that shortly after petitioner and Seay had left Milwaukee, agents of the Alcohol and Tobacco Tax Division began following the truck, and various agents continued to follow the same until the truck was parked at the storehouse of petitioner, who was a licensed merchant. Practically the moment it reached the store of the appellant, agents of the Alcohol and Tobacco Division seized the said truck and contents. A criminal warrant was secured from the United States Commissioner, charging petitioner and another with violation of §3115 and §3116 of the Internal Revenue Code, which warrant was dismissed on motion of the Government. Upon the trial of the case the Trial Judge allowed the introduction of evidence that petitioner had a bad reputation for violating the

liquor laws. This evidence was introduced over objections of Petitioner's counsel, and petitioner's counsel, believing the same to be a highly prejudicial error, did not introduce any evidence. A judgment of forfeiture was entered in the District Court, and that judgment was appealed to the U. S. Court of Appeals for the Fourth Circuit.

That Court affirmed the judgment of the lower court by a divided Court; Parker, Chief Judge, writing the majority opinion, and Soper, Circuit Judge, writing the dissenting opinion.

Absolutely no evidence was presented by the Government as to the purported use of the malt and sugar; the malt and sugar were not connected with any illegal operation of any sort, kind or description. The United States Court of Appeals for the Fourth Circuit was of the unanimous opinion that the evidence as to the reputation was erroneous, but Judges Parker and Hoffman held it to be "harmless error." And, in their opinions, they allowed such inadmissible evidence to prejudice them as much as it would prejudice a trial jury. The holding of the U. S. Court of Appeals did not require the Government to show any intent on the part of Snead to use the material in the illegal manufacture of whiskey, but by its decision held that the mere possession thereof placed the burden upon Smith, contrary to all decisions heretofore rendered. Snead had never been convicted of violating any whiskey laws.

ARGUMENT

Petitioner, who was shown by stipulation to be a licensed merchant, has never been convicted of any violations of the liquor laws, sent by truck, which was permissible, to Milwaukee, Wisconsin, and there purchased in the usual course of business, a load of fine ground malt and yeast, and returned

to his store in Henry County, Virginia. He was followed practically the entire distance by agents of the Alcohol and Tobacco Tax Unit, and upon his arrival at his store and the parking of his truck, the truck and malt and yeast were seized by the Government Agents. No legal evidence of his intent of use of such commodities were proven except the possession thereof for resale, was presented by the United States. Upon this state of facts the forfeiture of the truck and cargo has been affirmed upon appeal.

Section 3116 of the Internal Revenue Code is a counterpart of 27 USCA 30 and 27 USCA 39 of the former National Prohibition Act and the decision complained of in this petition, and is contrary to the following decisions:

In *United States* v. *301 Cans of Acme Malt,* Goldbert, claimant, 28 F. 2d 213 (Dist. Ct. Mass.), the Court said:

> "Malt extract is a product which has many legitimate uses. A recipe book put in evidence gives more than one hundred recipes for its use in various articles of food, including many kinds of bread, cake, desserts, candy, etc. It is said that its uses, especially in bread is widely approved, and is increasing. While no doubt a good deal of what is sold goes into beverages, a good deal does not. It is by no means an outlaw product, but is one of many common substances which can be used to make alcoholic liquor; e. g. sugar, yeast, apples, grapes, etc. The government in effect concedes this, for it makes no effort to distinguish between the malt extract and hops which were seized, and the sugar and yeast, maintaining that under the circumstances shown all are forfeitable."
>
> "In the present case, Goldberg's stock was entirely legal. He was ready to sell his goods to those who wanted to buy them, and he did not concern himself whether his custo-

mers bought for legal or illegal purposes. He probably knew that a certain proportion of what he sold was likely to be used in the violation of the law. There is the possibility that his business, and its legitimate aspects, was merely colorable; but the evidence submitted does not warrant such an extreme finding with respect to a stock of goods everything which is readily purchasable in reputable grocery shops, and is in every use for legitimate purposes."

In this case the Court in the concluding paragraph of its opinion, said:

"The intent must be as broad as the forfeiture claimed."

In *Jacobs* v. *Danciger,* et al., (Mo.) 41 S.W. 2d. 389, 77 A.L.R. 1237, which like the above case, involved the structures of the National Prohibition Act, it was held in effect that:

"1. Mere knowledge on the part of a seller of hops that buyer intends to use them for an illegal purpose does not render such a law a violation of the National Prohibition Act."

"2. To constitute a violation of the provisions of the National Prohibition Act (Title 27, Sec. 30) that it shall be unlawful to sell any utensil or substance designed or intended for use in the unlawful manufacture of intoxicating liquor, means things which are planned for the sole, or at least for the dominant purpose of making intoxicating liquor."

The Court further said that:

"Hops having many legitimate purposes, are not de-

> signed for manufacturing of liquor within the provisions of the National Prohibition Act to the effect that it shall be unlawful to sell any substance designed or intended for use in the unlawful manufacture of liquor."

This case, which involved the construction of Title 27, §30, of the National Prohibition Act, went to the Supreme Court of the United States for a writ of certiorari, wherein the writ was denied; see 284 U. S. 675, 52 S. Ct. 130.

In *United States* v. *Ryan,* 284, U. S. 167, 52 S. Ct. 65, 76 L. Ed., p. 24, in reversing the decision of the Court below, the Supreme Court of the United States established the construction to be given the words "together with all personal property" with respect to forfeitures. Where Mr. Justice Stone in his opinion said with respect to the National Prohibition Act:

> ". . . By reason and analogy, as well as by context we conclude that the general words 'all personal property whatsoever' were intended to include chattels other than the specified tools and implements, but to be restricted to those which, like tools and implements, are related to one of the other principle things, or incident to their intended use or disposition in fraud of the revenue."

In this opinion, Justice Stone also says:

> ". . . A literal application of the statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."

He then determines that the legislative purpose was to declare forfeited all personal property connected with or related to the evasion of the revenue laws.

The case of *United States* v. *Jenello* (C.C.A. 3rd) 1939, 102 F. 2d 587, where the government filed a libel of information for the forfeiture of a large quantity of distilled spirits, including a safe and its contents. The libel averred that no tax had been paid upon the distilled spirits, and that the intent was to thereby defraud the government. One of the appellees claimed some of the contents, including 36 rings and $5,430.00 in currency. The Court after referring to *United States* v. *Ryan,* 284, U. S. 167, 52 S. Ct. 65, 76 Law Ed. 224, said:

> "In the instant case there is no relationship between the rings and currency found in the safe and the possession of the tax-unpaid distilled spirits."

In *United States* v. 76 *five-gallon kegs,* 43 F. 2d 207, it was held that kegs, barrels, corks and bungs, owned by persons engaged in business as coal dealers, and who dealt in second hand materials of the kind designated above, were not subject to forfeiture under the National Prohibition Act, Title 27 §39, as "property designed for the manufacture of liquor intended for use in violating" the National Prohibition Act, even though the Federal agents who purchased such materials informed the seller that they intended to use the containers for the purpose of aging whiskey.

In *United States* v. *Sommerhauser,* 58 F. 2d 812 (Dist. Ct.) where a truck loaded with sugar drove up in front of an open door to a shed on a farm, and still was being operated in the shed. The truck was not unloaded. The government filed a motion to forfeit the truck and 22 bags of sugar. The defendant pleaded guilty to possession of still. The question was as to the forfeiture of the truck and sugar.

The Court said that there was an inference from the facts stated that the still was designed for the manufacture of whiskey

from sugar and that the sugar was being transported to the still in the truck, but that it was no more than an inference.

The Court held that the truck and sugar was not forfeitable.

A similar case to the above is that of *Day* v. *United States* (8th Cir.), 37 F. 2d 80, where Kenyon, J., said:

> "Granting that the Prohibition Officers were justified in believing from the smell of fermenting mash eminating from this building, and other circumstances that a felony was being committed in the building, does it follow that they had sufficient probable cause to assume that a man in the yard with 400 pound sacks of sugar at 9:30 at night, one of which he was attempting to load on his back, and with a few empty jugs in the truck, was participating in a felony? Nor does it satisfy Constitutional requirements that the evidence secured by the search of the person shows the party to be in fact guilty."

It was shown that the building contained a storeroom and several apartments above. The Court further said in this case:

> "The circumstances of appellant being in the yard and starting to unload sugar at 9:30 at night, was undoubtedly an unusual and suspicious circumstance. He might have been unloading the sugar for a perfectly legitimate purpose, or have been a teamster with no knowledge that a still was being operated, or he might have been taking the sugar to the storeroom or other apartments. . . . It cannot be assumed that mere possession of sugar is any proof that it is to be used in an illicit still."

In *Feitler* v. *United States,* 34 F. 2d 30 (3rd Cir.), it was held in effect that:

> "Bottles, corks and sealing wire, even in great quantities do not, standing alone, constitute property designed to be used in the manufacture of liquors. Ordinarily, they are lawful articles of commerce not affected by the National Prohibition Act. But when not standing alone, and are assembled and put on sale with clearly forbidden property, they take on a new character, and themselves become contraband and subject to forfeiture under Title 27 §30 and 39."

This case was affirmed in *Donovitz as surviving partner* v. *United States*, 281 U. S. 389, 74 L. Ed. 923, 40 S. Ct. 344, where Mr. Justice Holms said:

> "That if the empty containers and the other objects seized were offered for sale in such a mode as purposely to attract purchasers who wanted them for unlawful manufacture, as we interpret the word, they were designed for the manufacture and could be seized."

In *United States* v. *One Chevrolet Sedan*, 54 F. S. 554, where after discussing the case of *United States* v. *Ryan, supra*, the Court said:

> "Applying the construction to the case at bar, it becomes apparent that the personal property must in some way be connected with the operation of an unlicensed still before it is subject to forfeiture for the legislative purpose is to prevent the operation of an unlicensed still."

The theory of the decision of the Court of Appeals in this case is an unreasonable construction of the Statutes involved if applied to its conclusion would prevent a licensed merchant from handling sugar or meal because they are ingredients com-

monly used in the manufacture of illicit whiskey, lumber because it is used to make box fermenters; sheet copper because it is used in making illicit stills, and even a felt hat, as illicit whiskey is many times strained through a felt hat.

It is submitted that the connection of the malt and yeast in this case was used or intended to be used in violating the Alcohol Tax laws within the meaning of §3116 of the Internal Revenue Code. With the holding of this Court in *United States* v. *Lane Motor Company,* 344 U. S. 630, 73 S. Ct. 459, wherein this Court held that an automobile used solely for commuting to an illegal distillery was not subject to forfeiture.

2. *Can the doctrine of "harmless error" be held to supply the complete lack of evidence on the part of the government as to intent of the claimant?*

It is respectfully submitted that the evidence erroneously admitted as to reputation was not harmless. This question is fully set forth in Judge Soper's dissenting opinion, filed as an appendix hereto, and no more able argument can be presented than his dissenting opinion.

3. *Does the rule set forth in Coffey, Claimant,* v. *United States,* 116, U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684, *apply in a case in which the United States starts a criminal proceeding for the identical offense, and then voluntarily dismisses such proceeding before a United States Commissioner?*

Claimant on account of the identical acts upon which the Government relies to forfeit the truck and contents under §3115 and §3116 of the Internal Revenue Code. This criminal warrant was dismissed upon motion of the United States.

This Court in *Coffee, Claimant,* v. *United States,* 116 U. S.

436, 6 S. Ct. 437, 29 L. Ed. 684, held that an acquittal upon the same charge as that upon which forfeiture was relied, was a bar to forfeiture proceedings upon the same facts. It would certainly seem that when the United States institutes criminal proceedings, then dismisses the criminal proceedings and months have passed, and many grand juries held in the district, and no further effort has been made to revive the prosecution, that the rule in the Coffey case is applicable and the forfeiture should not be permitted.

The opinion of the Court of Appeals for the Fourth Circuit is hereto attached.

CONCLUSION

In view of the conflicts in the decisions in, and of the various Circuit Courts of Appeal, the importance of the questions involved and for the sake of uniformity, and the importance of having §3116 of the Old Internal Revenue Code construed, your Petitioner prays for a writ of certiorari issue under Seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court in this case numbered and entitled on its Docket as No. 6874, Henry Grady Snead, Claimant, Appellant v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by Statute; and that the judgment herein of said Circuit Court of Appeals for the Fourth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated January 28, 1955.

HENRY GRADY SNEAD
By: C. Carter Lee
Counsel for Petitioner

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Rocky Mount, Virginia
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 6874.

Henry Grady Snead, Claimant,
Appellant,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE.

(Argued October 5, 1954. Decided December 10, 1954.)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and HOFFMAN, District Judge.

C. Carter Lee and R. Roy Rush for Appellant, and Beverly A. Davis, III, Assistant United States Attorney, (John

Strickler, United States Attorney, and Thomas J. Wilson, Assistant United States Attorney, on brief) for Appellee.

PARKER, Chief Judge:

This is an appeal in a proceeding instituted under 26 USC 3116 to forfeit a truck with its load of yeast and barley malt on the ground that they were intended for use in violation of the internal revenue laws of the United States. The truck was claimed by one Henry Grady Snead and the case was tried before a jury, which returned a verdict in favor of the government. From judgment of forfeiture entered on the verdict, the claimant Snead has appealed. Three questions are presented by the appeal: (1) Was there sufficient evidence of unlawful intent on the part of Snead to support the verdict? (2) Was harmful error committed in the admission of testimony as to Snead's general reputation as a violator of the liquor laws? (3) Was there error in decreeing a forfeiture after a criminal proceeding instituted against Snead had been dismissed before the United States Commissioner? We think that all of these questions should be answered against appellant.

On the first question, there can be no serious doubt, we think, but that the evidence was not only sufficient to take the case to the jury but to establish the guilty intent of Snead beyond all doubt or peradventure. The truck was found parked in a group of old abandoned cars behind Snead's service station in a rural section of Henry County, Virginia. It was loaded with 400 pounds of compressed yeast and 14,000 pounds of fine ground malt, for which in that community there was no reasonable use except in the manufacture of "moonshine" whiskey. Snead had gone in the truck with one Seay to Milwaukee, Wisconsin, where they had purchased the yeast and malt, buying the yeast in the name of Turner Bakery, Canton,

Ohio, and the malt in the name of Roy Scott. The truck was registered in Virginia in the name of Dannie Shively. Officers of the state and federal governments kept it under observation from the time it left Milwaukee with its load of yeast and malt until its seizure. At the time it left Milwaukee it bore North Carolina license plates but in Illinois these were changed to Virginia license plates. At the time of the seizure there were no license plates of any sort on it. Snead admitted to the officers the ownership of the truck and that he had been driving it, but denied that he had been out of the state of Virginia. He claimed that he had purchased the malt "up in the country" but said he did not know from whom he purchased it and denied knowledge of the yeast. He did not take the stand nor introduce any evidence in explanation of the circumstances against him. He was not present at the trial and his counsel asked no continuance on account of his absence.

In the light of these circumstances, there can be no reasonable doubt but that Snead had the yeast and malt in his possession for an unlawful purpose. There would have been no reason, otherwise, in his taking a lengthy trip to purchase in Milwaukee articles which could have been purchased and transported much more conveniently in the ordinary channels of commerce, and there would have been no occasion for the purchase in fictitious names or for the change of license plates on the truck or for the false statements to the officers. A significant circumstance which can properly be considered, as this is a civil and not a criminal case, is the fact that Snead failed to take the stand to account for his possession of the large quantity of malt and yeast, which in his community would normally be used only in connection with illicit distilling. See *Williams* v. *United States,* 5 Cir. 199 F. 2d 921; *Stagner* v. *United States,* 5 Cir. 197 F. 2d 992; *Kent* v. *United States,* 5 Cir. 157 F. 2d 1, cert. den. 329 U. S. 785.

It is argued that Snead may have had the yeast and malt for

sale to others in ordinary course of trade. It is a sufficient answer that he offered no evidence to that effect and that he was engaged in no legitimate business which would account for their possession. Furthermore, if he had acquired and had them in his possession for use in the illegal manufacture of whiskey, it would make no difference that he intended to sell them to others who would engage in the actual manufacture. Merchants who procure supplies for illicit distillers, knowing of the purpose to which they are to be put, cannot shield themselves from the forfeiture which the law prescribes by providing that they are to be paid. *Backun* v. *United States*, 4 Cir. 112 F. 2d 635. As said by this court in that case:

> "* * * those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale. This is the view taken of the matter in a number of well considered cases in the

federal courts. *Pattis* v. *United States,* 9 Cir. 17 F. 2d 652; *Vukich* v. *United States,* 9 Cir. 28 F. 2d 666, 669; *Borgia* v. *United States,* 9 Cir. 78 F. 2d 550, 555; *Anstess* v. *United States,* 7 Cir. 22 F. 2d 594; *Hubinger* v. *United States,* 7 Cir. 64 F. 2d 772; *Rudner* v. *United States,* 6 Cir. 281 F. 516, 519. It is in harmony with the well settled rule that one who, with knowledge of the existence of a conspiracy, aids in carrying out its unlawful design makes himself a party thereto. *Simpson* v. *United States,* 4 Cir. 11 F. 2d 591."

We agree with appellant that evidence of Snead's reputation as a violator of the liquor laws was not competent evidence on the question of intent which the jury was trying. As to this, the general rule is applicable that, in civil actions not affecting the character or reputation of the parties, evidence as to character or reputation is not admissible. 20 Am. Jur., pp. 299 and 300. It has been expressly held that evidence of good character of the owner should be excluded in forfeiture proceedings. *Riggs* v. *State,* 217 Ala. 102, 115 So. 1; *Hammett* v. *State,* 42 Okla. 384, 141 Pac. 419. Evidence of his bad character should likewise be excluded, as it has no logical tendency to prove the fact in issue. Cf. *Davila* v. *United States,* 1 Cir. 54 F. 2d 356. Cases cited which allow proof of reputation of places in prosecutions for keeping a disorderly house or maintaining a nuisance have no bearing on the point here under consideration. Reputation of a place may very well tend to show the intent of the owner, but the reputation of the owner has no tendency to establish his intent and, in the absence of statute, we know of no cases holding it admissible even in the disorderly house and nuisance cases. In this case it is the intent of the owner in the possession of the truck and cargo which is in question. No cases are cited sustaining the

admissibility of the reputation of the owner to establish such intent and we know of none.

We think, however, that the error in the admission of this testimony was harmless in the light of the other testimony in the case. Possession of so large a quantity of yeast and malt in Henry County, Virginia, was not reasonably explainable on the basis of any lawful purpose, and the fact that Snead did not take the stand or offer any explanation was a deadly circumstance against him. Added to this were the inferences to be drawn from the purchases under assumed names in distant Milwaukee, the change of license plates and the false statements made to the officers. With the evidence as to reputation out of the case, the jury could not have rendered a verdict in favor of appellant without stultifying itself. In such situation, any error in the admission of the evidence must be held to be harmless. Wigmore on Evidence, 3d ed., vol. 1, pp. 364-395; 28 USC 2111; Rule 61 of Federal Rules of Civil Procedure; Rule 52(a) of Federal Rules of Criminal Procedure; *Lutwak* v. *United States*, 344 U. S. 750, 764; *Horning* v. *District of Columbia*, 254 U. S. 135; *Hilliard* v. *United States*, 4 Cir. 121 F. 2d 992, 999, cert. den. 314 U. S. 627; *Chevrolet Motor Co.* v. *Gladding*, 4 Cir. 42 F. 2d 440, 445, cert. den. 282 U. S. 872; *Carpenter* v. *United States*, 4 Cir. 280 F. 598; *Sneierson* v. *United States*, 4 Cir. 264 F. 268, 275-276, cert. den. 253 U. S. 490; *Dye* v. *United States*, 4 Cir. 262 F. 6, 11; *United States* v. *Tramaglino*, 2 Cir. 197 F. 2d 928, 932, cert. den. 344 U. S. 864; *United States* v. *Broxmeyer*, 2 Cir. 192 F. 2d 230, 234; *Simons* v. *United States*, 9 Cir. 119 F. 2d 539, 559, cert. den. 314 U. S. 616; *United States* v. *Wexler*, 2 Cir. 79 F. 2d 526, 530 (opinion by Judge Learned Hand), cert. den. 297 U. S. 703; *Miller* v. *United States*, 8 Cir. 21 F. 2d 32, cert. den. 276 U. S. 621; *Hobart* v. *United States*, 6 Cir. 299 F. 784.

Rule 61 of the Rules of Civil Procedure is controlling here, as this is a civil case. That rule provides:

> "Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The latest expression of the Supreme Court on the subject is contained in *Lutwak* v. *United States, supra,* involving the erroneous admission in evidence of a declaration made by one of a group of conspirators after the conspiracy had ended. The court said:

> "Was the admission of this one item of hearsay evidence sufficient to reverse this case? We think not. In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one. This is a proper case for the application of Rule 52(a) of the Federal Rules of Criminal Procedure. We hold that the error was harmless."

In *Kotteakos* v. *United States, supra,* 328 U. S. 750, 764, the Supreme Court said: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." Here there

was no "departure from a constitutional norm or a specific command of Congress"; and, in the light of the other testimony in the case, the jury could not have been influenced by the testimony as to character to return a verdict which it would not otherwise have returned. In *Dye* v. *United States, supra,* Judge Woods speaking for this court said, "Even if there had been distinct errors in the admission or rejection of testimony. or in the charge, they would not justify reversal. The guilt of the defendant was so conclusively proved that his acquittal would have been a clear miscarriage of justice." The same is true in this case as to Snead's intent with respect to the yeast and malt of which he was admittedly in possession.

There is no merit in the contention that the forfeiture proceeding cannot be maintained because of the dismissal before the United States Commissioner of the criminal proceeding against Snead involving the same subject matter. The case of *Coffee* v. *United States,* 116 U. S. 436, and *United States* v. *One DeSoto Sedan,* 4 Cir. 180 F. 2d 583, upon which appellant relies, hold merely that acquittal in a criminal case bars prosecution of a proceeding for forfeiture involving the same facts. This was in application of the principle of *res judicata,* which can have no possible application where the criminal proceeding was dismissed without trial.

For the reasons stated, the judgment appealed from will be affirmed.

Affirmed.

No. 6874.

SOPER, Circuit Judge, dissenting:

It seems unwise, especially in a case of minor importance, to make an unprecedented decision as to the kind of proof which may be received when the crucial issue is whether an individual has committed a crime. Technically the case before us is a civil action brought by the United States for the forfeiture of an automobile; but in order to succeed it was necessary for the Government to prove that the owner of the car had committed the criminal offense of using the car for the transportation of materials to be used for the illicit manufacture of distilled spirits with intention to defraud the United States. The nature of the charge is shown by the stipulation of counsel that the evidence offered in this case as to the transportation of the materials was presented to the United States Commissioner as proof that the owner of the car had committed a criminal offense in violation of §§ 3115 and 3116 of Title 26 of the Internal Revenue Code, and that subsequently the charge was dismissed at the direction of the United States Attorney.

With these facts in mind no good reason appears for relieving the Government from the obligation to prove its case by evidence which is in accord with the constitutional procedures followed in this country for the protection of persons accused of crime. In many civil and criminal cases it has been held that the commission of harmless error by the trial judge should not require a reversal; but except in cases relating to the keeping of a disorderly house, or the maintenance of a nuisance under the prohibition law, no case has been found which has

decided that evidence of bad reputation may be admitted as proof of a crime, or that its wrongful admission does not constitute reversible error.

The dearth of authority is doubtless due to two reasons: First it is quite impossible to say that evidence of bad character does not influence the trier of facts. In the pending case there was persuasive circumstantial evidence that the truck was used by Snead to transport the materials unlawfully, but the United States Attorney, obviously not satisfied that the evidence was strong enough to convince the jury, therefore offered the evidence of Snead's bad reputation and insisted upon its reception although the judge was somewhat doubtful of its admissibility. Moreover, it is reasonable to assume that the United States Attorney dismissed the criminal case because he realized that he could not use the evidence of reputation at the trial thereof. A glance at the evidence admitted over the objection in the instant case demonstrates at once its harmful character. Two federal officers and a county policeman, who admitted that they had never been able to secure sufficient evidence to justify the arrest of Snead for violating the liquor laws, were allowed to testify not only that Snead had a bad reputation for dealing in untaxed whisky, but also that he was *known* to them as a violator of the Internal Revenue laws, and that his service station was *known* to them as a transfer place for violators of these laws. In this state of the record how can it be said that the jury was not impressed by the testimony of the officers of the law or that the error of the court in admitting the evidence was harmless? It is not without significance that the United States Attorney in his brief does not invoke the doctrine of harmless error, on which the court has based its decision.

In the second place it is probable that no precedent for the action of the court has been found because it has never been

thought that the commission of crime may be proved by evidence of bad reputation. The requirement of the Sixth Amendment that in a criminal prosecution the accused shall enjoy the right to be confronted by the witnesses against him is fundamental to our jurisprudence, and the doctrine of harmless error may never be invoked "when there is a departure from a constitutional norm". *Kotteakos* v. *United States*, 328 U. S. 750, 764. This statement was made in a criminal case. But, when the controversy before the court turns on the proof of the existence of a crime, the rulings on points of evidence should not be governed by technicalities. It is far more important to safeguard constitutional principles than to save the time and effort that would be required to retry the case.